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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Amendment of Section 73.202(b)

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)

MM Docket No. 93-17

a site which would provide city grade coverage to Rosendale. In fact, SUNY expressly stated in its reply comments of April 16, 1993, that its intent was to remain at its current site. The problem with its current site is a deficient city grade contour. Its statement in that pleading was explicit and unequivocal -- "WFNP does not intend to actually construct at the allocation point, but intends to build facilities at its existing location. WFPN has been given site assurance..." at page 2. There is no "misimpression" on SHU/RSB's part as SUNY now alleges. However, now that SUNY has been made aware that its existing site does not provide city grade coverage to Rosendale as unreserved commercial channels are required to do (contrast Section 73.315(a) with the Note thereto), SUNY tries ineffectively to "clarify" its way out. SUNY now reveals that its clearly stated intention was only a strong preference to remain at its existing site. Further, SUNY announces that it will attempt to justify, i.e., request a waiver to use its current site at the application stage. The closest SUNY gets to stating affirmatively that it will move is that it "did not intend at this time to limit itself" to its existing site or that "it would be unwilling to construct at a fully spaced site...."

2. It should be absolutely apparent to the staff that the affirmative statement needed to justify a commercial allotment is nowhere to be found. The Commission's staff can not be

reassured by the "weasel" wording of SUNY's statements. This is SUNY's fourth effort to state affirmatively that it would apply for a site which meets the Commission's allocation rules, and it has again failed to do so. These are not magic words or phrases designed to trip up unknowing petitioners. These are statements that are made in the numerous allotment petitions that are entertained by the Commission's staff each year. Without such a statement, the staff will be making a defective allotment knowing that it will be faced with a waiver request. See Greenwood, South Carolina, et al., 2 FCC Rcd 3583 (1987), rev. denied, 3 FCC Rcd 4108 (1988), erratum 3 FCC Rcd 4374 (1988), and other cases cited in SHU/RSB's supplemental reply comments at page 6.

3. In Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, FCC 93-299, released July 13, 1993, the Commission reaffirmed the core policy objective of its allotment system at paragraph 13, "it is in the public interest to preserve the benefits of the current system by preventing the allotment of channels that would not meet our present allotment standards." At paragraph 14, the staff made this objective "abundantly clear" --

"For example, if X seeks to upgrade its station from Class A to Class C3, but the site which X specified fails to provide 'city-grade' service to its community of license and meet the minimum distance separation requirements of Section 73.207 of the Rules, X's application, unless amended

to cure this defect, will be dismissed.
[Footnote omitted.] This would be true even
if X could submit an application pursuant to
Section 73.215 of the Rules which would
otherwise comply with our rules."

4. In SUNY's case, its license is to be modified in the same manner as if it had requested an adjacent channel. Thus, this Commission decision is applicable. If the Commission were to allot this channel to Rosendale on the flimsy statement offered by SUNY, it would not only compromise its allotment system but also eliminate a more desirable allotment to Washington, New York, which could result in a first local service and a first noncommercial educational service to areas surrounding Sharon, Connecticut.

5. The Commission needs a firm foundation for a commercial allotment. SUNY's statements fatally lack the required commitment. It is clear that SUNY will be relying on

Hurley can still be accepted in this docketed proceeding since, by doing so, there would be no impact on the allotment of Channel 273A to Rosendale. Natole notes that SUNY has commented on Natole's counterproposal.

7. Natole fails to recognize that its failure to serve constitutes an ex parte filing in a restricted proceeding. See Section 1.1208(a) and (c)(2) of the Commission's Rules. Natole cites no case which holds that the fact that another party has actual knowledge of a filing cures the ex parte violation.

8. The proper treatment of Natole's proposal is for the Commission's staff to consider it in a separate rule making proceeding. However, due to the Commission's pending proceeding concerning the allotment of Channel 255A to Rosendale in this docket, the institution of a separate proceeding must await the outcome of this proceeding. Only if the Commission rejects the allotment of Channel 255A to Rosendale could the Commission initiate a new rule making for West Hurley. See e.g., Carolina Beach, North Carolina, 7 FCC Rcd 544, 547 (1992) at note 11 where the Commission issued a separate notice of proposed rule making for the allotment of a channel to Little River, South Carolina, after it was determined that the channel was not precluded by the outcome of other actions taken in that proceeding.


CONCLUSION

9. Accordingly, the Commission's staff must find that SUNY's carefully phrased statement of interest is far from adequate in providing the firm foundation upon which Channel 273A can be allotted to Rosendale as a commercial allotment. The Commission must also reject Natole's ex parte filing for consideration in this proceeding.

Respectfully submitted,

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July 19, 1993

CERTIFICATE OF SERVICE

I, Veronica Abarre, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., do hereby certify that I have this 19th day of July, 1993, caused to be mailed by first class mail, postage prepared, copies of the foregoing "RESPONSE TO MOTION FOR LEAVE TO RESPOND TO 'NATOLE'S COMMENTS ON SUNY RESPONSE TO SHU/RSB SUPPLEMENTAL REPLY COMMENTS' AND TO 'SUNY RESPONSE TO SHU/RSB SUPPLEMENTAL REPLY COMMENTS" to the following:

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